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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

DENNIS WELLIVER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is a sole proprietor's Fourth Amendment right against a warrantless seizure of his property destroyed because a government agency has a contractual right of access to the business records?

2. Whether oral juror questions to witnesses during a criminal trial are inherently prejudicial to the defendant's Fifth Amendment right to due process and Sixth Amendment right to a fair and impartial jury?

PARTIES TO THE PROCEEDING

The caption of the case in this Court contains the names of all parties to the proceeding in the United States Court of Appeals for the Eighth Circuit (Supreme Court Rule 14.1(b)).

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PETITION FOR WRIT OF CERTIORARI

Dennis Welliver ("Petitioner") petitions for a writ of certiorari to review a judgment of the United States Court of Appeals for the Eighth Circuit affirming his conviction and the district court's refusal to suppress evidence and the district court's procedure allowing jurors to ask witnesses questions.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 976 F.2d 1148 (8th Cir. 1992), and is reprinted at (A-1).

The oral rulings of the district court denying the Petitioner's motions to suppress are reprinted at (A-17).

JURISDICTION

The opinion of the Court of Appeals affirming Petitioner's conviction was entered on October 1, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment of the United States Constitution provides:

> **[ARTICLE IV]**
>
> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment of the United States Constitution provides:

> **[ARTICLE V]**
>
> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury,

except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of iaw; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment of the United States Constitution provides:

[ARTICLE VI]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

A. Summary.

Petitioner Dennis Welliver was the sole proprietor and president of Omaha All Risk Insurance Services ("OAR"), and of Nebraska Computer Financial Services, a company that did the accounting and computer work for

OAR. In 1988, an employee of Petitioner, after initially refusing, seized business and computer records of Petitioner at the express direction and instigation of a government agent for the Office of the Inspector General of the United States Department of Agriculture. The government agent did not have a warrant or subpoena for Petitioner's records. The seized records were admitted into evidence over Petitioner's objection by the United States District Court for the District of Nebraska at the criminal trial of Petitioner. The first trial resulted in a hung jury. At the second trial, over Petitioner's objections, the district court again admitted the records seized at the government's request, without a warrant. Also at the second trial, the court permitted the jurors to become participants in the trial by allowing them to ask questions out loud in the courtroom of five witnesses who testified at the trial.

Petitioner was convicted at the second trial of three counts of mail fraud, and two counts each of wire fraud, making a false statement, and theft. The government claimed and, the jury found, that Petitioner used the mails and telephone wires to submit false information to Crop Hail Insurance Actuarial Association ("CHIAA"), a non-government entity, to improperly obtain premature reimbursement on two claims and premature administrative expense monies from the Federal Crop Insurance Corporation ("FCIC").

The United States Court of Appeals for the Eighth Circuit affirmed Petitioner's conviction holding that Petitioner did not have a reasonable expectation of privacy in his business records and that the district court did not "plainly err" in allowing juror interrogation of witnesses.

B. Proceedings and Disposition in the District Court.

Petitioner had been an employee of the FCIC for many years. In 1983, he founded OAR. He operated OAR and Nebraska Computer and Financial Services, a company that did the accounting and computer work for OAR, as a sole proprietor at all times. OAR became the managing general agent for two Mutual of Omaha subsidiaries. The two subsidiaries had entered into standard reinsurance agreements with the FCIC. By 1984-85, OAR was writing over $18,000,000 in farmers' premiums for crop insurance.

Petitioner was an outspoken critic about the inadequacies of the FCIC operation and the costly delays in responding to the needs of the American farmer and the crop insurance industry. He testified before Congress in 1986 and 1987, at the invitation of Nebraska Congresswoman Virginia Smith, criticizing FCIC management. He also wrote numerous letters to officials within the FCIC complaining about its bureaucratic problems.

In 1987 and 1988, after his Congressional testimony, Welliver became the subject of an extensive FCIC investigation, including three audits. In May of 1988, after more than a year of fruitless investigation, a government agent employed by the Inspector General of the United States Department of Agriculture contacted one of Petitioner's computer programmers, Evelyn Tuma ("Tuma"), a 20 year old, outside of the office at her home. She initially refused to meet with him, but he called her again and arranged a meeting. At the meeting, he showed her his badge and gave her a piece of paper identifying the

penalties for aiding and abetting a felony, i.e., five to 15 years. He told her she did not need a lawyer. He questioned her about Petitioner's operation and she told him about some accounting procedures. The agent then asked Tuma to retrieve documentation of the accounting procedures. She had serious reservations about taking Petitioner's property without his permission, so she consulted another law enforcement officer, a county deputy sheriff. He recommended that she follow the federal agent's instructions, which she did.

The next night, at the direction of the federal agent, Tuma went to OAR's offices after business hours. The federal agent followed her and waited in the parking lot. Tuma took records from her supervisor's desk and gave them to the agent. On a second occasion, at the request of the same government agent, Tuma seized additional records by printing out computer programs that were in Petitioner's computer, i.e., no hard copy existed. She also gave these documents to the government agent who turned them over to the FCIC.

At no time did the FCIC utilize the contractual remedies in the reinsurance agreements to resolve its dispute with Petitioner. Instead of arbitrating the question of the propriety of Petitioner's accounting methods, as the reinsurance agreement provided, the FCIC used Tuma's statements and the records she seized at the government's request to obtain search warrants which were executed on four OAR branch offices and Petitioner's personal residence on October 25, 1988.

Petitioner was indicted in 1989 and tried for the first time in 1990. Following the first trial which resulted in a hung jury for Petitioner, and the acquittal of a co-defendant, Petitioner was tried for a second time in 1991. In general, the government claimed, and the jury found, that Petitioner used the mails and telephone wires to submit false information to CHIAA, a non-government entity, to improperly obtain premature reimbursement on two claims and premature administrative expense monies from the FCIC.

Specifically, the government claimed that Petitioner gave directions to submit false information by "doubling" the premiums paid and the losses claimed on *two policies*. Because the evidence was that OAR deleted the "doubling" shortly after it occurred, and before the FCIC investigation, the government only proved that Petitioner obtained premature reimbursement on government money, having the value of approximately $700.00 of lost interest for a period of time.

The government also claimed, and the jury found, that the Petitioner caused 1986 policy information on certain files to be "rolled over" and submitted to FCIC as 1987 policy information. Again, because OAR later corrected the 1987 information prior to any investigation, the government only proved that Petitioner obtained premature reimbursement of government money, having a value of approximately $7,000 of lost interest for a period of time. Significantly, the government did not contend that Petitioner was not ultimately entitled to the money he supposedly obtained from these accounting procedures; only that he received it prematurely. There was

evidence at trial that the FCIC was behind in its payments to Petitioner at that time in sums that far exceeded the amounts the government contended he obtained prematurely.

The government's case against Petitioner centered around the business records Tuma seized at the government agent's request prior to the search warrant, her testimony, and the testimony of Terry Anderson, Tuma's supervisor regarding these records. Anderson was the head of the computer department and the records that Tuma seized at the agent's request were in Anderson's desk and in Petitioner's computer. Petitioner moved to suppress and objected to the admission of the documents Tuma seized, the two witnesses' testimony about the business records, and all the fruits of this evidence.

The district court denied the motions to suppress holding that Petitioner had no reasonable expectation of privacy in the records and that Tuma was not an agent of the government when she procured the records for the government agent. (A-18, 19). The district court ruled that Petitioner had no reasonable expectation of privacy in his own business records because some of the information contained in the records would have been revealed to some outside person or company or agency. (A-18). The records Tuma seized at the government's request, prior to the search warrants, were admitted into evidence at the trial, and the basis of his conviction.

Throughout the trial, the district court invited the jurors to ask questions of each of the witnesses who testified. In response to the court's invitation, the jury asked questions of five of the witnesses in this case. The

individual jurors asked these questions out loud in open court. At no time did Petitioner's trial counsel interpose an objection for fear of offending individual jurors by objecting to their questions. On two occasions when a juror asked a question that was favorable to the defense, the court refused to allow the question to be answered. (A-14).

The jury in the second trial initially indicated that they were at an impasse and that all twelve jurors were certain of their opinions and felt their minds could not be changed. The district court directed them to deliberate further and changed its previously announced decision to allow the jury a four day holiday on the Fourth of July. Instead, the jury was required to return on Friday, July 5, 1991, and before noon, the jury found Petitioner guilty on all counts.[1]

C. Court of Appeals.

The Court of Appeals affirmed the denial of the suppression motions. The appellate court found it unnecessary to address Petitioner's subjective expectation of privacy because the government did not challenge Petitioner's subjective expectation and because there was evidence in the record to support a subjective expectation of privacy finding. (A-9). However, the appellate court stated that the determinative issue was "whether the

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[1] Petitioner was placed on probation for three years, with six months of home confinement and ordered to perform 600 hours of community service, pay restitution of the lost interest to the government of $7,724.87 and a fine three times the amount of the restitution.

subjective expectation of privacy was reasonable." (A-9). The Court of Appeals did not base its holding on the same ground as the district court. The appellate court held that Petitioner had no reasonable expectation of privacy in his own property because of a provision in the reinsurance agreement between the FCIC and the two Mutual of Omaha companies for which Petitioner was managing general agent. (A-10, 11).[2] The agreement, which Petitioner did not sign, states in relevant part as follows:

> Access to records and operations.
>
> The Company [Mutual of Omaha subsidiary] must provide FCIC, USDA, and the Comptroller General of the United States and their authorized representatives, for the purpose of investigation, audit, or examination, access to any record or operation of the Company. The Company must keep records that fully disclose all matters pertaining to this Agreement, including premiums and claims paid or payable under this Agreement. Records relating to premiums must be retained and available for three (3) years after final adjustment of such premiums, and records relating to reinsurance claims shall be retained and available for three (3) years after final adjustment of such claims.

(A-10, 11).

According to the Court of Appeals, Petitioner had no reasonable expectation of privacy in his own business

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[2] The district court had found that the reinsurance agreement "doesn't amount to or need not amount to a consent." (A-18).

records because under the provision in the reinsurance agreement, "the FCIC and other federal government entities had the right to inspect *any* company records." (A-11) (Emphasis in original). The court reasoned that Petitioner's expectation was clearly unreasonable because "he was obligated to give the FCIC 'access to any record or operation of the company' 'for the purpose of investigation, audit or examination.' " (A-11). Although it was undisputed that Petitioner was not a party to the reinsurance agreement in question, the Court of Appeals found that he was bound by the same rules and regulations as the reinsured Mutual of Omaha companies. (A-11).[3]

Regarding the juror questioning procedure, the Court of Appeals noted that previous decisions of the Court of Appeals had raised strong concerns about juror questioning of witnesses. "These decisions in which seven, now eight of the judges of this court have joined make evident that juror interrogation of witnesses presents substantial risk of reversal and retrial." (A-14). Notwithstanding this disapproval and its previous opinions, the Court of Appeals found no plain error in allowing the jury to ask questions at Petitioner's trial because it found no prejudice resulted from the trial court's procedure of allowing the jury to ask questions out loud and directing that two questions, favorable to the defense, not be answered. (A-14).

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[3] The district court made no such finding and the Court of Appeals independently made this determination.

REASONS FOR GRANTING THE WRIT

The questions presented by this case are of undeniable importance in the criminal justice system. The first issue will recur with increasing frequency as the investigation of alleged white-collar crime becomes more and more aggressive. Federal agencies and law enforcement officials need clear guidelines as to what seizures they can lawfully undertake; lower courts as well need this Court's guidance to assess the legality of those seizures. The decision of the Court of Appeals in this case, creates a new exception to the Fourth Amendment protection from warrantless seizures and conflicts with the decisions of this Court. It is also contrary to decisions of other courts of appeal on this important question of federal law, and requires review by this Court. If left to stand, the holding in this case will authorize any federal agent to seize private business records without a warrant merely if the federal agency has the contractual right to ask to see the records.

The second issue, juror interrogation of witnesses, is equally important. Allowing jurors to become advocates and possible antagonists of the witnesses does not, on its face, result in a fair trial and is inherently prejudicial. The present case provides this Court an opportunity to direct circuit courts and district courts to adhere to the command of the Fifth and Sixth Amendments, and prevent a distortion of the adversary system.

Petitioner respectfully requests this Court to grant certiorari on these important issues.

I.

A CONTRACTUAL RIGHT OF ACCESS TO BUSINESS RECORDS DOES NOT AUTHORIZE A WARRANTLESS SEIZURE OF THOSE RECORDS BY THE GOVERNMENT.

Petitioner's property, i.e., certain business records including computer programs, was seized by one of his employees at the instigation and direction of a government agent who had no warrant. The Court of Appeals ruled that Petitioner, a sole proprietor, had no reasonable expectation of privacy in his business records because the two Mutual of Omaha insurance companies for which he was a managing general agent had contractually agreed to provide the FCIC and two other federal entities access to certain of *its* records. (A-11).[4] In making the assessment of a reasonable expectation of privacy depend solely on one factor – the existence of a contract obligation to provide access – the Court of Appeals created new and erroneous Fourth Amendment law. Its holding squarely conflicts with the decisions of this Court and other courts of appeal.

The Court of Appeals' decision in this case is contrary to Supreme Court precedent in a number of important respects. In the first instance, the government's right to examine business records does not destroy an owner's

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[4] The Court of Appeals did not determine whether the employee was an agent of the government when she procured the records for the agent, because of its holding that petitioner had no reasonable expectation of privacy in his business records. (A-11). Clearly the employee's seizure constituted a government seizure due to the agent's instructions, instigation, and participation.

privacy right. In *Church of Scientology v. United States*, 113 S. Ct. 447 (1992) this Court considered whether compliance with an IRS summons enforcement order rendered the party's appeal from the order moot. In holding that the fact that the records had been turned over did not render the appeal moot, the Court noted that the Secretary of Treasury had authority "to examine any books, papers, records, or other data" which may be relevant or material to determining the liability of any person for any internal revenue tax. 113 S. Ct. at 449, n.2. Notwithstanding the Secretary's right to examine, this Court in *Church of Scientology* stated:

> *Taxpayers have an obvious possessory interest in their records.* When the government has obtained such materials as a result of an unlawful summons, *that interest is violated* and a court can effectuate relief by ordering the government to return the records. Moreover, even if the government retains only copies of the disputed materials, a taxpayer still suffers injury by the government's continued possession of those materials, namely, *the affront to the taxpayer's privacy.* A person's interest in maintaining the privacy of his 'papers and effects' is of sufficient importance to merit constitutional protection. . . . Even though it is now too late to prevent, or to provide a fully satisfactory remedy for, *the invasion of privacy that occurred when the IRS obtained the information on the tapes,* a court does have power to effectuate a partial remedy. . . .

113 S. Ct. at 450. (Emphasis added).

Explicit in *Church of Scientology, supra,* is the fundamental principle that an individual's or company's right

to privacy in his or its records is not automatically extinguished simply because the government has a right to examine the records.

Second, the Court of Appeals' total reliance on an expectation of privacy determination in this case, which clearly involves the seizure of Petitioner's property, is seriously called into question by the Court's recent decision in *Soldal v. Cook County*, 61 U.S.L.W. 4019 (U.S. December 8, 1992). In *Soldal*, this Court reaffirmed that the Fourth Amendment protects property even where privacy or liberty is not implicated. Moreover, the amendment protects seizures even though no search within its meaning had taken place. Thus, in the instant case, where a seizure of Petitioner's property clearly occurred, the Fourth Amendment applies. "What matters is the intrusion on the people's security from governmental interference. Therefore, the right against unreasonable seizures would be no less transgressed if the seizure of the house was undertaken to collect evidence, verify compliance with the housing regulation, effect an eviction by the police, or on a whim, for no reason at all." 61 U.S.L.W. at 4026.

In this case then, the dispositive issue for determination was whether the seizure of Petitioner's property was reasonable under all the circumstances, not whether the Petitioner's expectation of privacy was objectively reasonable. Thus, the Court of Appeals' analysis is fatally flawed and cannot remain uncorrected.

Third, this Court has repeatedly acknowledged that the right to examine records, even if statutorily conferred, does not authorize warrantless searches and seizures of

business records, except in a very limited number of highly regulated industries. It is well settled that the U.S. Constitution applies to government access to commercial premises and records. This Court has recognized that a search of private commercial property without private consent is unreasonable under the Fourth Amendment unless the search is authorized by a valid search warrant. *Camara v. Municipal Court*, 387 U.S. 523 (1967); *See v. City of Seattle*, 387 U.S. 541 (1967); *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978). An owner or operator of a business thus has an expectation of privacy in commercial property, which society is prepared to consider to be reasonable. *New York v. Burger*, 482 U.S. 691 (1987).

An exception to the warrant requirement is recognized, however, in certain industries in which government regulation is pervasive. *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970) (sale of alcoholic beverages); *United States v. Diswell*, 406 U.S. 311 (1972) (sale of fire arms); *New York v. Burger, supra*, (vehicle dismantling businesses).

The Court of Appeals' decision in this case is directly contrary to the above-cited Supreme Court precedent. Indeed, it creates a new exception to the warrant requirement for government seizures and inspections. Notwithstanding the fact that there was absolutely no government claim that the FCIC had a *statutory* right to inspect Petitioner's records or that Petitioner's business was highly regulated,[5] the Court of Appeals held that if a government entity had a contractual right of access to

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[5] In fact, at trial the FCIC never identified a single regulation or rule promulgated by the FCIC relevant to Petitioner's case.

business records, a business owner could never challenge the warrantless seizure of his records because he had no reasonable expectation of privacy. Such a holding is clearly invalid in light of this Court's Fourth Amendment cases.

Additionally, this is not a case where a corporate officer is claiming a right of privacy in corporate records. This case involves a sole proprietor who did not operate his businesses as corporations. The distinction between corporate and individual enterprise is one of the deepest in our constitutional law. In *Hale v. Henkel*, 201 U.S. 43 (1906), the Court stated:

> . . . we are of the opinion that there is a clear distinction in this particular between an individual and a corporation, and that the latter has no right to refuse to submit its books and papers for an examination at the suit of the State. *The individual may stand upon his constitutional rights as a citizen.* He is entitled to carry on his private business in his own way. His power to contract is unlimited. He owes no duty to the State or to his neighbors to divulge his business, or to open his doors to an investigation, so far as it may tend to criminate him.

201 U.S. at 74-75. (Emphasis added).

Petitioner had an objectively reasonable expectation of privacy in his business records so as to require a search warrant or an administrative subpoena before allowing his records to be seized by a government agent. As a sole proprietor, Petitioner's expectation of privacy in his business records is precisely the type of right that society recognizes as reasonable. *See New York v. Burger, supra,*

482 U.S. at 699. These records were not required by statute to be kept nor were they subject to inspection by statute. This case clearly does not fall within the exceptions recognized by this Court for warrantless searches and seizures in highly regulated industries.

The Court of Appeals' decision in this case also conflicts with the Court of Appeals for the Tenth Circuit in *United States v. Leary*, 846 F.2d 592 (10th Cir. 1988). It is also inconsistent with the Fifth Circuit's decision in *Mason v. Pulliam*, 557 F.2d 426, 429 (5th Cir. 1977). The Court of Appeals' premise in this case is that Petitioner lacked the requisite expectation of privacy in his own business records because the FCIC "had the right to inspect *any* company records." (A-11) (emphasis in original). The implicit suggestion is that somehow any privacy interest in the records was waived by the Petitioner or that he consented to the seizure. The "expectation was clearly unreasonable, as he was obligated to give the FCIC 'access to any operation of the company' 'for the purpose of investigation, audit, or examination.' " (A-11). The Court of Appeals ignored the district court's finding that the reinsurance agreement "doesn't amount to or need not amount to a consent," and deleted this language from its quote of the district court's conclusion. (A-9, 10, 18). In addition, the Court of Appeals erroneously equated a contractual right of access with a right of seizure without a warrant.

In *United States v. Leary, supra*, two officers of an exporting company challenged a search warrant pursuant to which 20 boxes of business records were seized. The government argued that either the individuals waived their Fourth Amendment rights or consented to the

search because they had adopted an "open door policy," inviting government agents to inspect their business records. *Id.* at 597. The Court found that the company's "open door" policy did not negate the defendants' expectation of privacy. "There is a distinction of constitutional significance between the company's policy, which invited government agents to 'visit . . . and ask for any file or information they want or need,' " and a seizure and removal of 20 boxes of files. *Id.* The Court specifically noted that the defendants invited the government agents to inspect and copy records, *not to seize them. Id.* at 599. The Court held that even if the defendants' policy could be characterized as an ongoing consent to government searches, the government had exceeded the scope of that consent by seizing the records. *Id.* at 599. Similarly, in *Mason v. Pulliam, supra,* the Fifth Circuit held that when the basis for a search or seizure is consent, the government must conform to the limitations placed upon the right granted to search, seize or retain the papers or effects. 557 F.2d at 429.

Contrary to the above cases, in the instant case, the Court of Appeals held that the Petitioner had no constitutional right to challenge the warrantless seizure of his records simply because he had contractually agreed to provide access to those records. In the first place, it must be noted that Petitioner was not a party to the contract in question; it was a contract between the FCIC and the two Mutual of Omaha companies for which the Petitioner was just the managing general agent. The records that the FCIC had the right of access to were Mutual of Omaha records, not Petitioner's. Secondly, even if the Court of Appeals was correct in accepting the claim that Petitioner

was bound as a managing general agent by its principal's contractual provision,[6] only access to records was agreed to, *not permission to seize them*. Petitioner, at all times, retained control over his premises and records and had given instructions to keep them confidential. He clearly had the authority to restrict the government's access to his business records, notwithstanding the contractual obligation. In fact, the contract itself provided for arbitration or administrative appeals for disputes.

The Court of Appeals improperly transformed Petitioner's contractual obligation to provide access, which he was free to breach, into a right of the government to seize business records without a warrant. Certainly Petitioner would have been entitled to expect that his records would not be taken from him without the government first requesting access. The reinsurance agreement relied upon by the Court of Appeals, contained other provisions, of which Petitioner was aware, which stated what action the FCIC could take against a company not in compliance with the provisions of the agreement. In addition to the usual remedies available to the FCIC for breach of contract, the agreement provided that the FCIC could rescind or deny liability for reinsurance, deny payment of a share of a premium or of an expense reimbursement payable, or refuse to assume any further reinsurance agreements. The agreement also allowed for

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[6] The district court did not make this finding. This is an example of how the Court of Appeals mischaracterized the facts in a number of respects in its opinion and drew faulty conclusions as a result.

arbitration or administrative appeal of any misunderstanding or dispute arising between the company and the FCIC. Thus, the very agreement relied upon by the Court of Appeals to destroy Petitioner's expectation of privacy, contains other provisions authorizing FCIC actions, none of which included warrantless seizures or even administrative subpoenas.

Clearly, the Petitioner did not unequivocally consent to the seizure of his business records, as a result of the contract provision which arguably obligated him to provide access to his business records.[7] If Petitioner consented to anything it was that the government could ask and look at his records; he did not give them his permission to take his records. The decision in this case cannot be squared with the decisions of the Tenth Circuit in *Leary* and with the Fifth Circuit opinion in *Mason*. However, it is arguable that the Court of Appeals' decision in this case is in line with the Second Circuit opinion in *United States v. Chuang*, 897 F.2d 646 (2nd Cir. 1990), *cert. denied*, 111 S. Ct. 77 (1991) (Bank president did not have a legitimate expectation in privacy in bank documents examined by the office of the Comptroller of the Currency ("OCC")). Although the holding in *Chuang* is more defensible because the defendant was a corporate officer of a bank, which is a heavily regulated industry and the OCC must conduct regular audits, its rationale is similar to the Court of Appeals in this case. Significantly, these four courts of appeals' decisions evidence a split of authority

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[7] The district court found that the provision did not amount to a consent. (A-17, 18).

in the important area of Fourth Amendment jurisprudence that demonstrates a clear need for Supreme Court consideration.

II.

JUROR QUESTIONING IN CRIMINAL CASES IS INHERENTLY PREJUDICIAL.

The question whether to permit jury questioning of witnesses during criminal trials, and if so, under what circumstances is an issue ripe for Supreme Court review. Numerous circuits have grappled with this issue with varying standards of review and results. For example, in the instant case the Court of Appeals applied the "plain error" standard of review and held that the district court had not committed plain error in allowing oral jury questions in the absence of a contemporaneous objection. (A-14). *See also United States v. Land*, 877 F.2d 17 (8th Cir.), *cert. denied*, 493 U.S. 894 (1989) (court held that, absent a contemporaneous objection, jury questioning, though a "somewhat troubling" procedure as implemented in that jurors stated their questions, as here, from the box without prior consideration by the court, could only be reviewed for plain error which was absent in that case). In *United States v. Johnson*, 892 F.2d 707 (8th Cir. 1989), the majority opinion found no plain error. However, Chief Judge Lay wrote a concurring opinion, joined by Judge McMillian, addressing the serious constitutional questions arising from the practice of jury interrogation of witnesses, particularly of the defendant in criminal cases. Additionally, in *United States v. Lewin*, 900 F.2d 145 (8th Cir. 1990), the court found no plain error *per se* in jury

interrogation and reviewed the jury questions for abuse of discretion by the trial court.

Other circuits have considered the question and their opinions evidence a lack of uniformity.[8] In *United States v. Polowichak*, 783 F.2d 410, 413 (4th Cir. 1986) the Fourth Circuit disapproved of the district court "inviting juror questioning . . . as well as permitting a juror to state his question within the hearing of the other jurors," but found no prejudice upon which to base a reversal. *Id.* at 413. Shortly before *Polowichak* was decided, the Fourth Circuit considered the question in a civil case and exhaustively described the dangers inherent in allowing juror questions. *DeBenedetto v. Goodyear Tire & Rubber Co.*, 754 F.2d 512, 516 (4th Cir. 1985). The dangers in the practice of allowing juror questions according to the Fourth Circuit are as follows: (1) Judicial system is founded upon the presence of a neutral fact finder to discern the truth from the positions presented by adverse parties. Only relevant and admissible evidence should be put before the neutral fact finder. Jurors are not trained in the law and do not know what is legally relevant and what is legally admissible. Thus, there is a much greater risk of improper or prejudicial questions from jurors. (2) An oral question whether answered or unanswered may

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[8] The state courts have also addressed this issue with inconsistent holdings. *See State v. Zima*, 237 Neb. 952, 468 N.W.2d 377 (Neb. 1991) (jury questioning prohibited); *People v. Heard*, 388 Mich. 182, 200 N.W.2d 73 (1972) (juror questioning is permitted within discretion of trial court); *People v. McAlister*, 167 Cal. App.3d 633, 213 Cal. Rptr. 271 (1985) (procedure allowed for juror to submit written questions, subject to review by the court and counsel).

influence the perceptions of the other jurors. (3) Even if the court takes remedial steps after an improper question is asked, the questioning juror may feel his or her pursuit of the truth has been thwarted. (4) Since questions are from one or more jurors, the possibility that the jury will attach more significance to the answers to these jury questions is great. *DeBenedetto, supra,* 754 F.2d at 517. Notwithstanding these dangers the Fourth Circuit did not reverse because it found no prejudice. *Id.*

In *United States v. Callahan,* 588 F.2d 1078, 1086 (5th Cir.), *cert. denied,* 444 U.S. 826 (1979), the trial court allowed one written jury question to be asked. The defendant appealed and the court of appeals said "proper handing of juror questions [was] a matter within the discretion of the trial judge." (Citations omitted). The Fifth Circuit Court of Appeals held that there was no error committed in allowing the one question to be asked and that the procedure employed of requiring jurors to put their questions in writing and clear their relevancy first with the court was not an abuse of the court's discretion. *Id.*

Yet, in *United States v. Nivica,* 887 F.2d 1110, 1123 (1st Cir. 1989), *cert. denied,* 494 U.S. 1005 (1990), the Court of Appeals for the First Circuit held that it was within the trial court's discretion to deny the defendant's request to allow jury interrogation, but generally disparaged the practice. "It seems foolhardy to suggest that a judge in a multiple defendant criminal case must freely allow jurors to question a witness. . . . " *Id.*

In *United States v. Witt,* 215 F.2d 580 (2nd Cir.), *cert. denied sub. nom. Talanker v. United States,* 348 U.S. 887

(1954), some jurors put questions to witnesses and received answers. The Second Circuit Court of Appeals held that the matter was within the judge's discretion, like witness-questioning by the judge himself. *Id.* at 584. However, the *Witt* opinion failed to discuss *Pacific Improvement Co. v. Weidenfeld*, 277 F. 224 (2nd Cir. 1921), in which the court stated that "a jury should listen to evidence, counsel should elicit, and the court should discourage, and, if necessary, suppress, such idly curious jurors as this record displays." *Id.* at 227.

Thus, the courts of appeals that have considered the question are not in accord. Some courts discourage juror questioning but allow the practice within the discretion of the trial court, and only review for prejudice. Some courts review only for plain error. One court did not allow any juror questioning. In contrast, some courts allow the jurors to submit written questions to the court, subject to review by the court and counsel.

Oral juror questioning is inherently prejudicial and the technique suggested by those jurisdictions that permit written questions, does not cure the problem because it does not deal with the fundamental question of what effect juror questioning may have, or may appear to have on juror impartiality. "The fundamental problem with juror questions lies in the gross distortion of the adversary system and the misconception of the role of the jury as a neutral fact finder in the adversary process." *United States v. Johnson*, 892 F.2d at 713 (Lay, C.J., concurring).

Due process requires a fair trial before a fair and impartial jury. Criminal convictions should be based on evidence elicited by counsel which is heard, evaluated

and acted upon by jurors who have no investment in obtaining answers to questions they have posed. Permitting juror questions puts the jury in the adversary process and disrupts neutrality. Our system of justice depends on a neutral jury. As Chief Judge Lay said in his concurring opinion in *Johnson, supra,* 892 F.2d at 715, "when the jury becomes an advocate or inquisitor in the process it forsakes its role of arbiter between the government and its citizens." Similarly, this Court has noted:

> The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action [of government]. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, bias, or eccentric judge. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it.

Duncan v. Louisiana, 391 U.S. 145, 156 (1968).

The issue of whether juror interrogation is proper reaches constitutional dimensions in a criminal case. A criminal defendant is constitutionally entitled to due process under the Fifth Amendment and to a trial by a fair and impartial jury under the Sixth Amendment. Jury questioning is inherently prejudicial and infringes upon the defendant's constitutional right of due process and right to an impartial jury.

As a matter of law, jurors should not be permitted to become participants in the trial at which they are the sole

judge of the facts. A defendant is prejudiced by allowing jurors to ask questions, because such conduct unfairly benefits the government by reopening direct examination and augmenting the government's case-in-chief. Jurors should not be allowed to assist the government in satisfying its burden of proof by adducing additional evidence through their questions which produce answers admissible against a defendant. The opportunity given the jury to ask questions creates a very great risk that inadmissible evidence may be adduced against the defendant. To the detriment of a defendant, jurors who are allowed to ask questions have a tendency to begin making up their mind before they have retired to the jury room and before they have begun discussing the evidence with the other jurors. As a direct result of the district court inviting jury questions, a defendant is prejudiced by being forced to risk alienating jurors by having to object to preserve the record or to allow the questioning to proceed. Lastly, the Federal Rules of Civil and Criminal Procedure and the Federal Rules of Evidence restrict the interrogation of witnesses to the parties and to the Court. The Court of Appeals in this case simply ignores the constitutional aspects of this prejudicial practice of allowing jurors to ask questions.

CONCLUSION

The Petitioner respectfully requests this Court to grant certiorari to address the important Fourth Amendment issue raised in the Petition. The decision of the

Court of Appeals creates a new exception to the requirement of a warrant for government seizures in the commercial setting that is in conflict with this Court's prior holdings and will continue to cause confusion in the circuits.

The Petition for Certiorari should be granted on the issue of juror questioning because numerous courts, both federal and state, have considered the question with conflicting results. In the criminal case, this practice takes on constitutional dimensions and is inherently prejudicial. The lower courts need guidance on this important question and Petitioner respectfully urges the Court to grant his Petition.

Dated: December 24 1992.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 91-3794

United States of America, Plaintiff – Appellee, v. Dennis Welliver, Defendant – Appellant.	*	Appeal from the United States District Court for the District of Nebraska.

Submitted: May 15, 1992
Filed: October 1, 1992

Before MCMILLIAN, JOHN R. GIBSON, and BEAM, Circuit Judges.

JOHN R. GIBSON, Circuit Judge.

Dennis Welliver was charged with a multi-count indictment in connection with the filing of certain accounting reports with the Federal Crop Insurance Corporation (FCIC). A jury convicted him of two counts of mail fraud, in violation of 18 U.S.C.A. § 1341 (West Supp. 1992), two counts of making false statements to the FCIC, in violation of 18 U.S.C.A. § 1014 (West Supp. 1992), two counts of theft, in violation of 18 U.S.C. § 641 (1988), and three counts of wire fraud, in violation of 18 U.S.C.A.

§ 1343 (West Supp. 1992). Welliver appeals, claiming that: (1) the district court erroneously allowed illegally obtained evidence; (2) the evidence was insufficient to support his conviction; (3) the district court should not have allowed the jurors to question witnesses; and (4) he was the victim of selective prosecution. We affirm the judgment of the district court.[1]

The FCIC, an agency of the United States Department of Agriculture, provides farmers with multiple peril crop insurance through reinsurance agreements with private insurance companies. The private companies sell and service the crop insurance policies, collect premiums, and settle claims. The FCIC reimburses the companies for their administrative expenses and for losses paid out to farmers. Reimbursements are based on monthly reports the private insurance companies are required to compile, certify as "complete and correct," and send to Crop Hail Insurance Actuarial Association. Crop Hail processes the reports for the FCIC, edits them for accuracy, and notifies the company of any errors. Crop Hail creates a monthly accounting report, and sends it to the company, which in turn sends it to the FCIC to receive payment.

Omaha Indemnity Company and Omaha Property and Casualty Company entered into standard reinsurance agreements with the FCIC. Welliver, the sole proprietor of Omaha All Risk Insurance Services in Lexington, Nebraska, was the managing general agent for these companies, and was responsible for conducting all daily

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[1] The Honorable Warren K. Urbom, Senior United States District Judge for the District of Nebraska.

transactions with the insureds and the FCIC. Managing general agents are bound by all the FCIC rules and regulations applicable to the reinsured companies themselves.

Welliver was also the sole proprietor of Nebraska Computer and Financial Services, a company that did the accounting and computer work for Omaha All Risk. Terry Anderson was Welliver's director of computer operations. Evelyn Tuma, a computer programmer for Nebraska Computer and Financial Services, created, maintained, and tested computer programs and assisted with various computer operations and Crop Hail transmissions.

In May 1987, Welliver met with Tuma and Anderson to discuss the delayed entry of Omaha All Risk's 1987 premium information into their computer system, which delayed reporting to the FCIC and held up reimbursement. Welliver asked them to "roll over" 1986 premium information and submit it to Crop Hail as current 1987 information. Welliver asked Anderson to maintain a listing of the rolled over policies. Tuma wrote a program and rolled over the policies as Welliver had instructed.

In March 1988, Welliver again met with Tuma and Anderson and discussed "doubling" approximately $80,000 of losses on Crop Hail reports by changing the "seed code." This could be done by running an existing reported loss that had cleared the Crop Hail edits through the system a second time under a different code to report it as a separate, additional loss. Anderson doubled a loss from a California insurance policy, and Tuma also doubled losses at Welliver's direction, including two from Colorado and California policies in April 1988.

In 1988, Gary Diers, a special agent for the Office of the Inspector General of the United States Department of Agriculture, began investigating Omaha All Risk regarding a matter unrelated to this case. He contacted Evelyn Tuma and met with her on May 26, 1988. Diers showed Tuma his badge and a piece of paper listing the penalties for aiding and abetting. He told her she was not in any trouble, she did not need a lawyer, and he simply wanted to ask her some questions about Omaha All Risk. Tuma eventually told Diers about the rollovers and described certain documents at Omaha All Risk that would constitute evidence of the practice. Diers asked Tuma to retrieve these documents for him, but Tuma had reservations. Diers assured her that as long as the documents were not under "lock and key" and were not "something [she] shouldn't be looking at any way," she had a right to obtain them.

Tuma, still unsure about the propriety of taking the documents out of the office, contacted the local county sheriff, who told her that he thought it was within her rights to take the documents. Tuma went to Omaha All Risk and retrieved a number of documents from Terry Anderson's desk drawer, which both she and Anderson used. Tuma also later gave additional documents to Diers. These documents were used to prepare search warrants for Omaha All Risk's Nebraska and Texas offices, which were executed October 25, 1988.

A grand jury charged Welliver and Paul Buchanan Jr., Omaha All Risk's Texas branch manager, with various counts of mail fraud, wire fraud, false statements, theft, and conspiracy in connection with their dealings with the FCIC. At trial, Welliver moved to suppress the records

Tuma turned over to Agent Diers. The district court denied the motion, concluding that Tuma was not an agent of the government and Welliver had no expectation of privacy in the documents. The jury acquitted Buchanan, but could not reach a unanimous verdict against Welliver. The district court dismissed the conspiracy count against Welliver and declared a mistrial on the remaining counts.

At his second trial, Welliver again moved to suppress the documents Tuma had taken, and the district court denied the motion. The jury convicted Welliver on all counts. The district judge sentenced Welliver to three years probation and six months of home confinement. He ordered Welliver to perform 600 hours of community service, pay a fine of $23,174.61, and make restitution in the amount of $7,724.87. Welliver filed this appeal.

I.

Welliver argues that the district court erred in denying his motion to suppress the business records[2] Tuma seized and all the testimony concerning the records because the seizures violated his Fourth Amendment

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[2] The records at issue are as follows: An internal Omaha All Risk computer print-out which Anderson created and used to change the seed code for doubling losses; Tuma's handwritten notes on the policies she used to double losses; a computer print-out Tuma created of the raw data pertaining to doubling; a print-out of the program Tuma created to roll over 1986 policies into the 1987 year; computer print-outs of policies that Tuma rolled over and sent to Crop Hail Insurance; and a computer print-out containing a comprehensive listing of the policies Omaha All Risk rolled over.

rights. One claiming a Fourth Amendment violation must show that: (1) he had a legitimate expectation of privacy, and (2) that expectation was invaded by government action. *Smith v. Maryland*, 442 U.S. 735, 740 (1979).

We first consider whether Welliver had a legitimate expectation of privacy in the records Tuma seized. This is a two-part inquiry: (1) whether Welliver asserted a subjective expectation of privacy, a question of fact; and (2) whether Welliver's subjective expectation is objectively reasonable, a question of law. *United States v. Kiser*, 948 F.2d 418, 423 (8th Cir. 1991), *cert. denied*, 112 S. Ct. 1666 (1992) (relying on *Smith*, 442 U.S. at 740, and *California v. Ciraolo*, 476 U.S. 207, 211 (1986)). The Supreme Court first enunciated this test in *Katz v. United States*, 389 U.S. 347, 351, 353 (1967).

Under *Katz*, the first question involves determining whether the person, by her conduct, has demonstrated an actual expectation of privacy, *id.* at 361 (Harlan, J., concurring), or sought to preserve something as private. *Id.* at 351-52. The second question involves deciding whether the individual's asserted privacy interest is legitimate, i.e., "one that society is willing to recognize as 'reasonable.' " *Id.* at 361 (Harlan, J., concurring). In *United States v. Hendrickson*, 940 F.2d 320 (8th Cir.), *cert. denied*, 112 S. Ct. 610 (1991), we stated that "[t]he test for legitimacy is not whether an individual chooses to conceal his or her activity, but instead 'whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment.' " *Id.* at 322 (quoting *Ciraolo*, 476 U.S. at 212). We concluded that this "ultimate question under *Katz* 'is a value judgment.' " *Id.* (citations omitted).

The district court relied on two cases involving employees who have turned their immediate employer's business records over to the government: *United States v. Ziperstein*, 601 F.2d 281 (7th Cir. 1979), *cert. denied*, 444 U.S. 1031 (1980), and *United States v. Miller*, 800 F.2d 129 (7th Cir. 1986). In *Ziperstein*, the defendant owned medical clinics that received Medicare and Medicaid funding and two companies that handled the Medicare and Medicaid billing. 601 F.2d at 284. He argued that the district court erred in failing to suppress certain records he claimed one of his employees, a pharmacist, had "stolen" and turned over to the government.[3] *Id.* at 288. The Seventh Circuit held that the defendant had no legitimate expectation of privacy in the documents. *Id.* at 289. The court relied on *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978), which states that "[w]hat [employees] observe in their daily functions is undoubtedly beyond the employer's reasonable expectation of privacy." *Ziperstein*, 601 F.2d at 315. The court in *Ziperstein* reasoned that pharmaceutical prescriptions came within the pharmacist's daily observations, and accordingly, there was no impropriety in his "obtaining control over the records which serve[d] as the basis of his daily activities." *Id.* at 289.

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[3] The defendant also claimed that the pharmacist was acting as an agent of the government in obtaining these records. 601 F.2d at 288. The Seventh Circuit rejected this theory because the employee initiated contact with the government to report evidence of wrongdoing in one of defendant's clinics, obtained the documents legitimately, and gave the documents to the FBI on his own volition. *Id.* at 289. Our disposition of Welliver's case on the grounds of legitimate expectation of privacy, *see infra* at 10 [A-11], makes it unnecessary to discuss the government agent issue.

Seven years later, the Seventh Circuit faced a similar issue in *Miller*. An employee, refusing his employer's request that he hide business records at his home, contacted the authorities and suggested that they immediately come to the clinic, ask for the records, and have a subpoena. *Miller*, 800 F.2d at 131-32. The authorities did so. *Id.* at 132-33. The district court in *Miller* found that all the clinic employees had access to the records and none of the records were kept in restricted or private areas. *Id.* at 131. Further, the employee had access to the employer's premises, permission to use all the records there, and did, in fact, use many of them on a regular basis. *Id.* at 131-32. The district court denied the defendant's motion to suppress. *Id.* at 133.

In its Fourth Amendment inquiry, the Seventh Circuit focused on whether the employee was the custodian of the records. *Id.* Discussing agency principles of actual and apparent authority, the court cited *Marshall* regarding "what 'employees observe in their daily functions.' " *Id.* at 134 (quoting *Marshall*, 436 U.S. at 315). The court held that the district court's findings of fact indicated that the employee had actual authority to turn over the records. *Id.* The court pointed out, however, that the employer's order to hide the records expressly limited the employee's authority. *Id.* at 134-35. It acknowledged that the employer asserted a subjective expectation of privacy in the documents, but held that his order to the employee constituted an unacceptable request to obstruct justice. *Id.* at 135. The court upheld the district court's denial of the motion to suppress, concluding that the employee's authority to dispose of the records defeated the employer's Fourth Amendment claim. *Id.*

Although both *Ziperstein* and *Miller* relied on *Marshall*, we are not convinced it is dispositive of the issue before us. Certainly, *Marshall* mentions that the observations of employees in their daily functions are beyond an employer's reasonable expectation of privacy, 436 U.S. at 315, but it does not treat this issue in detail. It is also true that neither *Ziperstein* nor *Miller* analyzed the facts under the two part subjective and objective expectation of privacy *Katz* test.

The district court in this case did not specifically discuss Welliver's subjective expectation of privacy. This, however, is similar to *California v. Ciraolo*, 476 U.S. at 211, in which the Supreme Court found it unnecessary to address the subjective expectation of privacy question because the finding on that issue had not been challenged. Likewise, although the district court made no finding on this issue and seems to have assumed it, the government has not challenged Welliver's subjective expectation, and there is evidence in the record to support a subjective expectation of privacy finding.

The determinative issue, however, is whether the subjective expectation of privacy was reasonable, and in this respect, the district court concluded:

> I think it's true that there was no reasonable expectation of privacy in the information contained in these documents. It was expected that the information contained in these documents, or much of it, would be sent to [Crop Hail]. . . .
>
> The fact that not all of the information would likely go any place doesn't retain for the whole the expectation of privacy. As far as I can tell it's probably true that the only information

> on the documents that would not be revealed to some outside person or company or agency was the fact that this really was 1986 information rather than 1987. . . . But the rest of it was expected to go some place, whether in detailed form or in summary form. I think that ruins the claim of a reasonable expectation of privacy.
>
> The presence of the reinsurance agreement is not irrelevant. . . . [I]t has to do with whether there was a reasonable expectation that these documents, information in the documents would be kept private. And it militates in the direction of nonprivacy.

Suppression Hearing Transcript at 123-24. We are convinced that the district court did not err in ruling that Welliver had no objectively reasonable expectation of privacy in the documents. Therefore, under *Ciraolo*, which accepted and assumed a subjective expectation of privacy but found that it was not objectively reasonable, 476 U.S. at 212-15, we must reject Welliver's argument that the evidence should have been suppressed.

Much testimony at the suppression hearing focused on whether the documents were for internal purposes only or whether they would be sent to Crop Hail and the FCIC. The reinsurance agreement resolves the issue. A provision of the agreement states:

> Access to Records and Operations
>
> The Company must provide FCIC, USDA, and the Comptroller General of the United States and their authorized representatives, for the purpose of investigation, audit, or examination, access to any record or operation of the Company. The Company must keep records that

> fully disclose all matters pertaining to this Agreement, including premiums and claims paid or payable under this Agreement. Records relating to premiums must be retained and available for three (3) years after final adjustment of such premiums, and records relating to reinsurance claims shall be retained and available for three (3) years after final adjustment of such claims.

Under this provision, the FCIC and other federal government entities had the right to inspect *any* company records. Although Welliver argues that his company, as merely a managing general agent, was not a party to the reinsurance agreement with the FCIC, Timothy Hoffman, the FCIC's director of the Kansas City, Missouri compliance office, testified that managing general agencies are bound by the same rules and regulations as the reinsured companies. Even if Welliver subjectively asserted his expectation of privacy in the documents at issue, that expectation was clearly unreasonable, as he was obligated to give the FCIC "access to any record or operation of the Company" "for the purpose of investigation, audit, or examination." Because of this holding, we need not determine whether Tuma was an agent of the government when she procured the records for Agent Diers. We conclude that the district court did not err in denying Welliver's motion to suppress.

II.

Welliver argues that the evidence was insufficient to support his conviction. Although he admits that he "does not challenge the fact that the government evidence

established that the 'doubling' and 'rollover' did occur," he contends that there was insufficient evidence of his criminal intent.

In reviewing the denial of a motion for acquittal, we view the evidence in the light most favorable to the government, giving it the benefit of all reasonable inferences from that evidence. *Glasser v. United States*, 315 U.S. 60, 80 (1942); *United States v. Long*, 952 F.2d 1520, 1524-25 (8th Cir. 1991). We will reverse only if the jury must have entertained reasonable doubt as to the defendant's guilt. *United States v. Jones*, 880 F.2d 55, 64 (8th Cir. 1989).

Welliver's argument hinges on witness credibility and slight inconsistencies in the testimony of Evelyn Tuma and Terry Anderson. Our review of the record shows that there was sufficient evidence to demonstrate Welliver's intent to commit the rollovers and doubling. Both Tuma and Anderson testified that in May 1987 they met behind closed doors with Welliver, who asked them to roll over the 1986 premium information and submit it to Crop Hail as current 1987 information. Both of them recalled that Welliver had gotten the idea from other companies that were employing the process. They said that Welliver wanted to get premium information reported sooner so "we could get our commission, our money back sooner." Tuma wrote the program and used it to roll over policies at "Dennis's instructions."

Although Welliver argues that problems getting information to pass through Crop Hail's edits motivated the rollovers, both Tuma and Anderson testified that the situation was created by Omaha All Risk's own inability to process information so it could be reported to Crop

Hail. Tuma testified that Welliver had stated that he did not believe the rollover process was "quite Kosher." When the rollover process created a large error list, Welliver commented to Anderson and Tuma that they "couldn't even cheat right."

Anderson testified that in March 1988 Welliver met with him and Tuma and discussed how to double certain losses on Crop Hail reports by changing the seed code. Welliver specifically told them that he wanted to double approximately $80,000 of losses. Although Tuma could not specifically recall a meeting taking place in March 1988, she remembered a number of meetings regarding doubling. She doubled losses several times after discussions with Welliver and specifically recalled doubling certain Colorado and California losses in April 1988 at his direction.

Even if Welliver properly blames the Crop Hail edit system for his resort to doubling losses, his argument is premised on the assumption that he was entitled to submit false information to FCIC through Crop Hail to compensate for processing problems. The reinsurance agreement, which Welliver was bound by, clearly forbade such a practice, as it required that all reports submitted to the FCIC be "complete and correct."

Regardless of Welliver's stated motivations, there was sufficient evidence for the jury to conclude that he intentionally directed his employees to submit false information to Crop Hail and the FCIC and, therefore, sufficient evidence to support his conviction.

III.

Welliver also argues that the district court erred in allowing the jurors to question the witnesses at trial. Welliver, however, failed to make a single objection during the jury questioning. Accordingly, we review only for plain error. *United States v. Land*, 877 F.2d 17, 19 (8th Cir.), *cert. denied*, 493 U.S. 894 (1989).

Welliver makes lengthy policy arguments against allowing the practice of jury questioning. His specific complaints, however, involve the court's refusal to allow witnesses to answer two questions that Welliver claims were favorable to his defense. The district court rejected both of these questions on relevancy grounds. We must therefore conclude that the district court did not plainly err in allowing juror interrogation of witnesses.

Nevertheless, we state once again that we have strong concerns about juror questioning of witnesses. In this case, the potential for error was magnified as the questions were propounded before other jury members. In at least three cases, members of this court have voiced strong objections to this practice. *United States v. Gray*, 897 F.2d 1428, 1429-30 n.1 (8th Cir. 1990) (Judges Bowman, Beam, and Henley); *United States v. Johnson*, 892 F.2d 707, 711-15 (8th Cir. 1989) (Judges Lay and McMillian concurring and stating that juror questioning is "inherently prejudicial and should not be condoned"); *United States v. Land*, 877 F.2d at 19 (Judges Arnold, Bowman, and Magill). These decisions in which seven, now eight, of the judges of this court have joined make evident that juror interrogation of witnesses presents substantial risk of reversal and retrial. Where a record is properly made

and the record permits a conclusion that prejudice occurred, this will be the inevitable result.

IV.

Finally, Welliver claims the district court erred in failing to grant him a hearing on his motion to dismiss on the ground of selective prosecution. A defendant has a heavy burden in proving a selective prosecution claim, *United States v. Eklund*, 733 F.2d 1287, 1290 (8th Cir. 1984), *cert. denied*, 471 U.S. 1003 (1985), and must meet a two-part test for a prima facie claim. *Id.* The defendant must first show that the government has singled him out for prosecution, while failing to prosecute others similarly situated who engaged in similar conduct. *Id.* Second, he must show that the government based its discriminatory selection on an impermissible ground such as religion, race, or exercising the right of free speech. *Id.*

A district court should grant a hearing on a defendant's selective prosecution claim if the defendant alleges "sufficient facts to take the question past the frivolous state," *United States v. Catlett*, 584 F.2d 864, 866 (8th Cir. 1978), and raises a reasonable doubt about the prosecutor's purpose. *Id.* Without these showings, it is presumed that the government prosecuted the case in good faith and in a nondiscriminatory way pursuant to its duty to bring offenders to justice. *Eklund*, 733 F.2d at 1291.

The district court determined that Welliver met the first part of the prima facie test, but failed the second. Specifically, Welliver's claims that the government prosecuted him because he criticized the FCIC were unsupported by factual allegations sufficient to raise a

reasonable doubt as to the government's motives. The record demonstrates that the district court did not err in so holding, and we affirm its denial of Welliver's motion to hold a hearing on this matter.

We affirm the district court's judgment.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

DISTRICT COURT'S ORAL RULINGS

THE COURT: It is a very interesting subject and I wish I had more time to work on it. But I have to do the best I can with our limited amount of time.

Of course, we're governed by the Fourth Amendment and, which is to say that no unreasonable searches or seizures will be made. And there's a number of questions arise under that constitutional amendment as to the (sic) whether there was a seizure, whether there's a search, whether whatever was done was unreasonable if there was a search or a seizure.

The only two cases that I've been able to find that have similarity are United States versus Miller, M-i-l-l-e-r, 800 Federal 2nd 129, Seventh Circuit, 1986, and United States versus Ziperstein, Z-i-p-e-r-s-t-e-i-n, 601 Federal 2nd 1281, 1979.

First, with respect to Mr. Naylor's argument that you can't say Mr. Welliver gave a consent, I think consent is not the issue. Question under constitutional analysis is rather in this situation whether there was an expectation of privacy. A reasonable expectation of privacy, which is different from consent. And, related, but they're different. And, of course, consent would end the inquiry. But there also is the issue of reasonable expectation of privacy.

I don't think I can say there was consent in the sense that Mr. Welliver knew that these documents, these particular exhibits were going to be sent to somebody. That would be unrealistic.

On the other hand, I think it's true that there was no reasonable expectation of privacy in the information contained in these documents. It was expected that the information contained in these documents, or much of it, would be sent to CHIAA. CHIAA would send it back and then at least a recap of it would be sent to FCIC.

The fact that not all the information would likely go any place doesn't retain for the whole the expectation of privacy. As far as I can tell it's probably true that the only information on the documents that would not be revealed to some outside person or company or agency was the fact that this really was 1986 information rather than 1987. That's true, I think. Not expected to go any place. But the rest of it was expected to go some place, whether in detailed form or in summary form. I think that ruins the claim of a reasonable expectation of privacy.

The presence of the reinsurance agreement is not irrelevant. [sic] Doesn't amount to or need not amount to a consent. But I don't think it's irrelevant either. I think you, again, it has to do with whether there was a reasonable expectation that these documents, information in the documents would be kept private. And it militates in the direction of nonprivacy.

If there was no reasonable expectation of privacy then it doesn't matter whether Miss Tuma was an agent of the government or whether she was her own private person and an employee of Mr. Welliver's company only. I don't think she was an agent of the government.

I think it's true that she was, she was impelled by two separate considerations, connected but separate, in

that either could operate independently, but they both operated at once in her instance.

One was that she expected that something was afoul and thought it was the right thing to do to turn the records over to an investigator. And second, that she thought that she might be accused or suspected or charged with some impropriety herself and that this would be for her own good interest to turn these things over and help her side.

And I think both those interests impelled her. I don't know which one was predominant. I think they worked together.

Does that make her an agent of the government? I don't think so. I don't think someone who cooperates with the government in the sense of turning over information thereby becomes an agent of the government.

It's true that she did not turn over the information on her own. I mean without any participation in that decision by the government agent. Indeed, she received some encouragement from him. He requested that she return, turn this information over to him. And she did so accordingly. But I don't think that makes her an agent of the government.

The result of that, as I see it, is that there was no seizure or search by the government. I think I shall stop there.

It seems to me I don't need to make any further findings or declarations. Wonderfully interesting question. But I shall, I'm comfortable with the decision and I shall stand by it. The motion to suppress is denied.

Oh, I might, so that you don't think I overlooked it, Exhibit 77 may be different. And that's true, it may be different. I mean by that there was less expectation of dissemination of it. Let me think about that a moment.

Mr. Welliver's testimony was that he thought that kind of information, not that very document, would be transmitted to CHIAA. I think the document itself was kept, as Mr. Naylor pointed out, for internal use. That's what actually happened to it. And it was particularly for Ms. Tuma's use.

There is in one of these cases cited a discussion of the matter of telling an employee not to turn over, not to take out, or I think in that instance it was just the opposite, do take out these documents so that the authorities don't get them.

And the Seventh Circuit said that won't fly as an exception to the idea that the employer can limit the authority of the employee to turn over records. And under that kind of a declaration by the employer, the employee, employee's turning over the records was perfectly justifiable.

Which I suppose has to do with if the reason you are seeking nondissemination is that you want this to be a covering of impropriety then you're going to be unsuccessful in your Fourth Amendment argument. And this may be said to be akin to that.

Exhibit 77 is a tougher one all right. But I think I shall stand by my ruling that the documents are admissible. And the motion is denied.

Supreme Court, U.S.
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No. 92-1110

In the Supreme Court of the United States

OCTOBER TERM, 1992

DENNIS WELLIVER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner's Fourth Amendment rights were violated when one of his employees turned over petitioner's business records to the government.

2. Whether the district court committed plain error in permitting jurors to question some of the witnesses at trial.

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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals, Pet. App. A1-A16, is reported at 976 F.2d 1148.

JURISDICTION

The judgment of the court of appeals was entered on October 1, 1992. The petition for a writ of certiorari was filed on December 29, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Nebraska, petitioner was convicted on two counts each of mail fraud, in violation of 18 U.S.C. 1341; making false statements, in violation of 18 U.S.C. 1014; and theft, in violation of 18 U.S.C. 641; and on three counts of wire fraud, in violation of 18 U.S.C. 1343. He was sentenced to six months' home confinement, three years' probation, a period of community service, and a fine. Pet. App. A1-A2, A5. The court of appeals affirmed. *Id.* at A1-A16.

1. The Federal Crop Insurance Corporation (FCIC), an agency of the United States Department of Agriculture, provides farmers with crop insurance through reinsurance agreements with private insurance companies. The private companies issue the policies, collect the premiums, and settle claims. The FCIC reimburses the companies for their administrative expenses and for losses paid out to farmers. Reimbursements are based on monthly reports that the private insurance companies are required to compile, certify as correct, and send to the Crop Hail Insurance Actuarial Association (Crop Hail). Crop Hail processes the reports for the FCIC, creates a monthly accounting report, and sends it to the company, which in turn submits it to the FCIC for payment. Pet. App. A2.

Petitioner was the sole proprietor of Omaha All Risk Insurance Services. In that capacity, he functioned as the managing agent for two companies (Omaha Indemnity and Omaha Property and Casualty) that had reinsurance agreements with the FCIC. Petitioner conducted all of the daily transactions between the insurance companies and the FCIC. Petitioner was also the sole proprietor of Nebraska Computer and Financial

Services, a company that did the accounting and computer work for Omaha All Risk. Pet. App. A2-A3.

In May 1987, petitioner met with Evelyn Tuma, a computer programmer at Nebraska Computer, and Terry Anderson, petitioner's director of computer programming. At the meeting, they discussed the delayed entry of Omaha All Risk's 1987 premium information into their computer system, which had resulted in late reporting of the data to the FCIC and a delay in reimbursement to the insurance companies. Petitioner directed the employees to "roll over" 1986 premium information and submit it to Crop Hail as current 1987 information. Petitioner also directed Anderson to keep a list of rolled over policies and ordered Tuma to write a program to roll over the policies. Pet. App. A3. In March 1988, petitioner also instructed Anderson and Tuma to "double" approximately $80,000 of losses on Crop Hail's reports by changing the "seed code." Changing the code allowed petitioner to report a single loss twice. Anderson doubled a loss from a California policy; Tuma doubled losses from various other policies. *Ibid.* at A3.

In 1988, Gary Diers, a Department of Agriculture investigator, began an investigation of Omaha All Risk on an unrelated matter. In May 1988, Diers questioned Tuma about Omaha All Risk's business practices. Tuma told Diers about the rollovers and mentioned that Omaha All Risk maintained some incriminating documents at its offices. Diers asked whether Tuma could obtain the documents for him, as long as they were not under "lock and key" and were not "something [she] shouldn't be looking at anyway." Pet. App. A4. Unsure whether she should comply with Diers' request, Tuma sought advice from a local sheriff, who told her that he thought she was entitled to take the documents. Tuma retrieved several documents, including some from Anderson's desk drawer, to which both she and Anderson had regular

access. She then gave the documents to Diers. The documents included an internal Omaha All Risk computer printout that was used to change the "seed code" for doubling losses; Tuma's handwritten notes on the policies she used to double losses; a computer printout Tuma created of raw data pertaining to doubling; a printout of the program Tuma created to roll over 1986 policies into the 1987 year; computer printouts of rolled over policies that Tuma sent to FCIC; and a computer printout containing a comprehensive listing of rolled over policies. The documents were used to prepare search warrants for Omaha All Risk's Nebraska and Texas offices. The warrants were executed on October 25, 1988, and the information obtained led to petitioner's prosecution. *Id.* at A4-A5 & n.2.

Prior to trial, petitioner moved to suppress the business records that Tuma gave to Diers. The district court denied the motion on the ground that Tuma was not an agent for the government and that petitioner had no expectation of privacy in the documents. Pet. App. A4-A5.

2. The court of appeals affirmed. First, the court held that the seizure of petitioner's business records did not violate the Fourth Amendment. The court reasoned that, because the reinsurance agreements with the FCIC required production of any records concerning matters relating to the agreements, petitioner had no reasonable expectation of privacy in the records at issue. The court stated that, even though petitioner's company, Omaha All Risk, was not a party to the reinsurance agreements between the FCIC and the primary insurers, petitioner was nevertheless bound by the agreements' terms because his company was required to comply with the same rules and regulations as the reinsured companies. Pet. App. A3, A5-A11.

The court also held that the district court did not plainly err in permitting some members of the jury to question witnesses during the trial. Although the court expressed its displeasure with that practice, it held that the absence of any showing of prejudice in the record precluded reversal in this case. Pet. App. A14-A15.

ARGUMENT

1. Petitioner contends (Pet. 13-22) that the district court should have suppressed the records that were taken from his company's business premises by his employee, Tuma, and turned over to the Department of Agriculture. The court of appeals correctly resolved that issue against petitioner, and it does not merit further review.

The records at issue in this case were business records that were prepared by petitioner or Tuma, and Tuma was authorized to have access to those records in connection with her responsibilities. Pet. App. A5 n.2, A20. By exposing the records to his employees, petitioner abandoned any expectation of privacy in those records, at least with respect to his employees. See *Marshall* v. *Barlow's Inc.*, 436 U.S. 307, 315 (1978); *United States* v. *Miller*, 425 U.S. 435, 442 (1976); *United States* v. *Miller*, 800 F.2d 129, 134 (7th Cir. 1986); *United States* v. *Ziperstein*, 601 F.2d 281, 289 (7th Cir. 1979), cert. denied, 444 U.S. 1031 (1980).

Because petitioner had charged Tuma with the responsibility for preparing the records and had granted her a general right of access to the records and to the places where they were kept, Tuma could validly consent to reveal those records to the government without violating petitioner's Fourth Amendment rights. See *United States* v. *Matlock*, 415 U.S. 164, 170 (1974) (valid consent given by one party having common authority over premises or effects sought to be inspected); *United*

States v. *Miller*, 800 F.2d at 134 (documents that employees observe in their daily functions are beyond the protection of the Fourth Amendment, as long as employees have legitimate access to the documents as part of their business responsibilities); *United States* v. *Ziperstein*, 601 F.2d at 289 (no impropriety in pharmacy employee obtaining control over, and revealing to the government, his employer's pharmaceutical records "which serve as the basis of [the employee's] daily activities").

No doubt, petitioner hoped that Tuma would not disclose the incriminating documents to the government or otherwise reveal his unlawful scheme. But a wrongdoer who enlists others to assist him takes the risk that the others will cooperate with law enforcement authorities and produce evidence against the wrongdoer, even while purporting to maintain their relationship with him. See *Hoffa* v. *United States*, 385 U.S. 293, 302 (1966); see also *United States* v. *Miller*, 425 U.S. at 443 ("This Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed."); *United States* v. *White*, 401 U.S. 745, 749 (1971) (opinion of White, J.); *Lewis* v. *United States*, 385 U.S. 206 (1966). The conduct of such an informant does not violate the wrongdoer's Fourth Amendment rights, as long as the informant does not exceed the scope of his authority as an employee, associate, or invitee.[1] For that reason,

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[1] Thus, as the Seventh Circuit pointed out in *Ziperstein*, 601 F.2d at 289-290, an employee would not be entitled to remove documents from his workplace if they were not related to the duties of the employee who took them, or if the employee did not have legitimate access to the documents.

Tuma's voluntary disclosure of the business records that she had prepared and to which she had a general right of access did not violate petitioner's rights and require suppression either of those records or of the materials obtained pursuant to the later warrant-authorized searches.

As the court of appeals noted, Pet. App. A11, the nature of the documents disclosed and the FCIC's broad right of access to petitioner's business records lend further support to the view that Tuma's conduct did not violate any legitimate expectation of privacy on petitioner's part. The terms of the reinsurance agreements between petitioner's client companies and the FCIC, which the court of appeals found were binding on petitioner, required the periodic production of any records relating to the insurance reimbursement program for the purpose of any investigation, audit, or examination. Pursuant to that agreement, petitioner had previously furnished his business records to the FCIC and Crop Hail. Gov't C.A. Br. 14. Because petitioner's records were required to be made available for regular government inspection, the contents of those documents did not constitute private matters of the sort that ordinarily are deemed to support a reasonable expectation of privacy against governmental inspection. See *United States* v. *Miller*, 425 U.S. at 442-443 (banking records that are required to be maintained because they have a high usefulness in criminal, tax, and regulatory investigations). Thus, on the facts of this case the court of appeals correctly held that peti-

tioner could not challenge the seizure of his business records.[2]

2. Petitioner also contends (Pet. 22-27) that the district court erred by allowing the jurors to question some of the witnesses at trial. The procedure is reviewed only

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[2] This analysis is not inconsistent with the decision in *United States* v. *Leary*, 846 F.2d 592 (10th Cir. 1988). In that case, the Tenth Circuit held that two export traders had a reasonable expectation of privacy in their business records. Although the federal regulation at issue in *Leary*, 846 F.2d at 597, stated that export businesses "may be requested" to produce required records and "make them available for inspection," the regulation also authorized the government to obtain an administrative or judicial subpoena of the pertinent records in the event that "voluntary cooperation is not forthcoming." The court of appeals explained that the regulation's explicit provision for "judicial review before records [could] be seized without permission," created a reasonable expectation of privacy in the defendant's business records. *Ibid.* Here, in contrast, the terms of the reinsurance agreements that were binding on petitioner specifically required him to produce his business records on request, without the option of voluntarily producing his records or submitting to legal process. Accordingly, the reasoning in *Leary* has no force in these circumstances.

Petitioner's reliance on *Mason* v. *Pulliam*, 557 F.2d 426 (5th Cir. 1977), is also misplaced. *Mason* held only that a businessman who consents to the seizure of his business records by a government agent may subsequently withdraw his consent and demand the return of those records. No issue concerning the limits of consent are presented in this case. Nor does the decision below conflict with *Church of Scientology* v. *United States*, 113 S. Ct. 447 (1992). There the Court held that an appeal from an order enforcing an IRS summons against certain tapes containing tax records was not moot merely because the IRS had obtained and listened to the tapes. The Court stated that the IRS's continued physical possession of the tapes invaded the taxpayers' "interest in maintaining the privacy of his 'papers and effects.' " 113 S. Ct. at 450. In this case, Tuma's valid consent to the disclosure of the business records to which she had access overrode petitioner's interest in withholding the records from the government.

for plain error because petitioner did not object to the questioning at trial.[3] The plain error doctrine requires reversal only if the error resulted in a miscarriage of justice. *United States* v. *Young*, 470 U.S. 1, 14-16 (1985). Here, although petitioner argues generally that it is inadvisable for a court to allow the jurors to question witnesses, he has not explained how any particular question prejudiced him. Under these circumstances, the court of appeals was correct to hold that there was no plain error.

Petitioner further contends that the circuits follow different practices with regard to allowing questions by jurors. In no circuit, however, is the practice considered plain error. The circuits are therefore not in conflict on the issue presented by this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1993

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[3] Petitioner argues (Pet. 9) that he did not object to jurors' questions because he did not want to offend the jury. However, petitioner could have objected to the questions at a point in the trial when the jury was absent. Petitioner also contends (*Ibid.*) that the district court erred by selectively barring two juror questions that were favorable to the defense. Neither question was relevant, however, Pet. App. A14, so each was properly excluded.

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No. 92-1110

In The

Supreme Court of the United States

Ocober Term, 1992

DENNIS WELLIVER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY BRIEF TO THE BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Is a sole proprietor's Fourth Amendment right against a warrantless seizure of his property destroyed because a government agency has a contractual right of access to the business records?

2. Whether oral juror questions to witnesses during a criminal trial are inherently prejudicial to the defendant's Fifth Amendment right to due process and Sixth Amendment right to a fair and impartial jury?

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To The United States Court Of Appeals
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REPLY BRIEF TO THE BRIEF IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals, Pet. App. A-1-A-16, is reported at 976 F.2d 1148.

JURISDICTION

The judgment of the Court of Appeals was entered on October 1, 1992. The Petition for a Writ of Certiorari

was filed on December 29, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

REPLY TO ARGUMENT

This Reply Brief is addressed to an argument first raised in the Brief in Opposition filed by the United States. The United States opposes the Petition for Certiorari as it pertains to the Fourth Amendment issue on a ground not decided by the Court of Appeals. The Court of Appeals held that the determinative issue was whether Petitioner's subjective expectation of privacy was reasonable and applied a test enunciated in *Katz v. United States*, 389 U.S. 347, 351 (1967). In its Brief in Opposition, the government does not discuss *Katz*, and devotes only one paragraph of its argument to the Court of Appeals' analysis. Gov't. Br. 7-8.

Rather than substantively respond to the Fourth Amendment argument asserted by the Petitioner, which was based upon the holding of the Court of Appeals, the government fabricates a new issue that mischaracterizes the evidence and was not ruled upon by the Court of Appeals. In an attempt to focus the Court's attention away from the real issue decided by the Court of Appeals, the government argues that there was no Fourth Amendment violation because Tuma, an employee of Petitioner could and allegedly did, voluntarily disclose Petitioner's business records to the government agent. Gov't. Br. 5. This argument is not based on the facts of this case or the Court of Appeals' holding.

Further, the government's reliance on *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 315 (1978); *United States v. Miller*, 425 U.S. 435, 442 (1976); *United States v. Miller*, 800 F.2d 129, 134 (7th Cir. 1986); and *United States v. Ziperstein*, 601 F.2d 281, 289 (7th Cir. 1979), *cert. denied*, 444 U.S. 1031 (1980), Gov't. Br. 5, is misplaced. This is not a case where an employee voluntarily reported a violation to the government. *See Marshall v. Barlow's, Inc.*, 436 U.S. at 315. This is not a case where an employee freely and without government involvement voluntarily came forward. *See United States v. Ziperstein*, 601 F.2d at 290. This is not a case where the government had a subpoena and served it upon the custodian of the company's records. *See United States v. Miller*, 800 F.2d at 135. Further, this is not a case where the government obtained the evidence from a third party, such as the bank in *United States v. Miller*, 425 U.S. 435 (1976). This is a case where it is undisputed that the employee seized Petitioner's property at the instigation and direction of government Agent Diers, and the encouragement of a state deputy sheriff.

It is undisputed that Agent Diers contacted Tuma who was only 20 years old at the time, and showed her a piece of paper containing the penalties for aiding and abetting, *i.e.* five to fifteen years. Pet. App. A-4. It is undisputed that Agent Diers asked her to go to Petitioner's office at night and retrieve certain business records. *Id.* It is also undisputed that Agent Diers waited outside Petitioner's office in a car while Tuma went inside and took the business records from her boss' (Anderson's) desk. It is also undisputed that Agent Diers asked Tuma, a second time to retrieve another document that did not even exist in hard copy, and that Tuma

returned to the office on a day that she wasn't working and printed out a computer program from Petitioner's computer and gave it to Agent Diers. *See id.*

Under these circumstances, the government's involvement in, knowledge of, and participation in the searches and seizures of Petitioner's property was sufficient to make Tuma an agent of the government for purposes of the Fourth Amendment.

Although the Fourth Amendment's protections against unreasonable searches and seizures do not extend to a search or seizure made by a private individual, *Burdeau v. McDowell*, 256 U.S. 465 (1921), this Court has recognized an exception to this general rule. It has been held that a search or seizure occurs within the meaning of the Fourth Amendment and that the constitutional protections are fully applicable in the case of a search by a private individual who becomes the agent of the police by virtue of their suggestion, order, request, or participation for purposes of a criminal investigation. *See, e.g., Lustig v. United States*, 338 U.S. 74 (1949); *United States v. Walther*, 652 F.2d 788 (9th Cir. 1981); *United States v. Newton*, 510 F.2d 1149 (7th Cir. 1975); *Knoll Associates, Inc. v. FTC*, 397 F.2d 530 (7th Cir. 1968); *see also, Gundlach v. Janing*, 401 F. Supp. 1089 (D. Neb. 1975), *aff'd*, 536 F.2d 754, 755 (8th Cir. 1976) (*per curiam*).

The government may not do through a private individual, that which it is otherwise forbidden to do. If, in light of all the circumstances, a private party conducting a search must be regarded as an instrument or agent of the government, the Fourth Amendment applies to that

party's actions. *Coolidge v. New Hampshire*, 403 U.S. 443, 487 (1971).

The above analysis and line of cases applies in this case. The test for determining whether Tuma became an agent of the government does not change just because she happened to be an employee of the Petitioner. Otherwise, the government could avoid the reach of the Fourth Amendment simply by making an employee its agent for purposes of conducting searches and seizures. In this case, there can be no doubt that the government requested the searches and seizures, encouraged the searches and seizures, knew of the searches and seizures, and accepted the fruits of the searches and seizures. There was prior knowledge, instigation, and direction. This conduct constitutes involvement by the government in the searches and seizures sufficient to make Tuma an agent of the government for purposes of the Fourth Amendment.

The government's Brief in Opposition to the Petition for Certiorari fails in any way to address the issue of Tuma's status as an agent of the government. The government's brief totally ignores the circumstances of Tuma's searches and seizures of these records and would have this Court believe that this case simply involved an employee who voluntarily came forward and turned over her employer's business records without any instigation, or participation by the government. The informant cases cited by the government at page 6 are simply not applicable in this case. Accordingly, the government's primary argument pertaining to the Fourth Amendment issue should be rejected because it is not supported by the record in this case, nor is it based upon a ruling of the

Court of Appeals. The Court of Appeals expressly stated that it was not necessary to determine whether Tuma was an agent of the government. Pet. App. A-7, n.3, A-11.

The government's argument incorrectly assumes that Tuma was not an agent of the government when she seized Petitioner's records for Agent Diers. This was not the holding of the Court of Appeals. Thus, the whole premise of the government's primary argument in opposition to the Petition for Certiorari on the Fourth Amendment issue is faulty and its conclusion is fatally flawed. The government should not be allowed to conveniently ignore the holding of the Court of Appeals in this case for purposes of this Court's consideration of the Petition. If this Petition for Certiorari is not granted on the Fourth Amendment issue, the law of this case and in the Eighth Circuit will be that a sole proprietor does not have a reasonable expectation of privacy in his business records if a government agency has a contractual right of access to those records.

The Petition for Certiorari should be granted for the reasons articulated in the Petition. Regarding the Fourth Amendment issue, the Court of Appeals held that under *Katz*, the Petitioner did not have a reasonable expectation of privacy in his business records because of the agency's contractual right of access. This decision creates a new exception to the Fourth Amendment protection from warrantless searches and seizures and conflicts with the decisions of this Court. If left to stand, the holding in this case will authorize any federal agent to seize private business records without a warrant merely if the federal agency has the contractual right to ask to see the records.

Lastly, notwithstanding the government's conclusory two paragraph argument regarding the juror questioning issue, Gov't. Br. 8-9, the practice of permitting jurors to question witnesses during a criminal case is inherently prejudicial to a defendant's Fifth Amendment right to due process and Sixth Amendment right to a fair and impartial jury. In addition, Petitioner was prejudiced by the jury interrogation process in this case which constituted plain error. One juror asked a question out loud in open court that would have been grounds for a mistrial, if it had been asked by the prosecutor. Allowing the juror to ask the question in open court constituted prejudice to the Petitioner, and was not cured by the fact that the judge refused to allow the witness to answer. Pet. App. A-14.

CONCLUSION

Petitioner respectfully requests this Court to grant certiorari to address the important Fourth Amendment issue raised in this Petition. The decision of the Court of Appeals creates a new exception to the requirement of a warrant for government seizures in the commercial setting that is in conflict with this Court's prior holdings and will continue to cause confusion in the circuits. The government's Brief in Opposition does not adequately respond to this issue.

The Petition for Certiorari should be granted on the issue of juror questioning because numerous courts, both

federal and state, have considered the question with conflicting results. In a criminal case, this takes on constitutional dimensions and is inherently prejudicial. The lower courts need guidance on this important question and Petitioner respectfully urges the Court to grant his Petition.

Dated March 18, 1993.

Respectfully submitted,

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